BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ENRIQUE ACUNO Claimant	)	
VS.	)	
INDEL CORP. Respondent	)	Docket No. 1,052,882
AND	)	
CONTINENTAL WESTERN INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the September 28, 2011, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on January 10, 2012. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Nathan D. Burghart, of Lawrence, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an injury by accident that arose out of and in the course of his employment with respondent on April 7, 2008. The ALJ found that claimant had a 5 percent functional impairment as a result of his work accident. Further, the ALJ found that as of August 20, 2010, claimant is entitled to a work disability of 57.75 percent, which is the average of claimant's 100 percent wage loss and a 15.5 percent task loss. The ALJ ordered respondent to pay claimant's medical mileage to see his authorized treating physician, Dr. George Wright, as well as to reimburse claimant for the cost of batteries for a TENS unit that had been prescribed by Dr. Wright. Last, the ALJ found claimant was entitled to ongoing medical care for medication management and other chronic pain treatment.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

During oral argument to the Board, counsel for respondent admitted claimant suffered an accident and injury at work on April 7, 2008, as alleged. Therefore, whether claimant suffered personal injury by accident that arose out of and in the course of his employment is no longer an issue.

Respondent requests review of the nature and extent of claimant's disability, including the amount of claimant's functional impairment and whether claimant is entitled to a work disability, and whether claimant should be entitled to future medical.[1]

Claimant asserts the evidence supports the ALJ's finding that claimant suffered both a permanent functional impairment and a work disability as a result of the April 7, 2008, accident. Claimant contends that the medical and task loss opinions of Dr. P. Brent Koprivica are more credible than those of Dr. Chris Fevurly and, therefore, asks the Board to modify the ALJ's Award to find that claimant has a 10 functional disability and a 65.5 percent work disability. Claimant further asks that the Board affirm the ALJ's finding that he is entitled to authorized, unauthorized and future medical treatment, as well as ongoing medical care and treatment for medication and chronic pain management.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's injury and disability as a result of the April 7, 2008, accident?

(2) Is claimant entitled to ongoing and future medical treatment?

FINDINGS OF FACT

Claimant was employed as a laborer by respondent, a company that builds residential homes. On April 7, 2008, claimant and two other employees were attempting to remove a piano from a duplex owned by respondent. When claimant tried to help lift the piano, he felt a pain in his lower back. He immediately reported the injury to his supervisor.

Claimant was seen at the emergency room and later by his personal physician, Dr. George Wright, whose treatment was eventually authorized by respondent. Claimant was complaining of low back pain that radiated down his left leg. An MRI of claimant's lumbar spine was performed on April 17, 2008. The MRI revealed that claimant had

[1] During oral argument to the Board, counsel for respondent agreed that future medical was only an issue to the extent that respondent was disputing the permanency of claimant's injury. Also, there was no longer any issue as to whether claimant is entitled to unpaid medical mileage and reimbursement for the cost of a TENS unit battery.

multilevel degeneration with broad-based disc bulging at L4-L5, but he had no significant spinal stenosis. Claimant also had a second MRI on April 27, 2009, which revealed a minimal diffuse disc bulge with a small right disc protrusion at L5-S1, as well as a diffuse disc bulge with a small central disc protrusion at L4-L5. A third MRI, taken on April 26, 2011, again showed multilevel degenerative disc disease most pronounced at L4-L5 and L5-S1 with mild protrusions but no apparent canal or foraminal stenosis.

Dr. Wright diagnosed claimant with back pain and a bulging disc and referred him to physical therapy. He also prescribed pain medication and a muscle relaxant. He took claimant off work until May 5, 2008, when he released him to light duty for one week and then to full duty with no restrictions. At that time, Dr. Wright discussed with claimant general back care strategies, ways of lifting, and activities that would likely help claimant avoid further injury. Throughout the course of his treatment, claimant was given four epidural injections, the first one on May 2, 2008, and the last one on February 6, 2009. Dr. Wright referred claimant to Dr. John Ebeling for a surgical consultation. Claimant was seen by Dr. Ebeling on May 21, 2009, and after examining claimant and reviewing his latest MRI scan, Dr. Ebeling stated he did not recommend surgery. The last visit Dr. Wright had with claimant before his deposition was taken was on June 13, 2011. At that time, Dr. Wright recommended another epidural steroid injection as well as physical therapy.

Dr. Wright testified claimant had some degenerative disc disease and muscle strain, and is now left with degenerative disc disease. He could not say for sure whether claimant's degenerative disc disease was caused by his work injury. He could not say if the bulging disc at L4-5 was due to the accident or degeneration. Claimant had three MRIs, April 17, 2008; April 27, 2009, and April 26, 2011. Dr. Wright said there were no meaningful differences in the findings on the different MRIs.

Claimant testified that when he returned to work, he worked in the office for a couple weeks, after which he went back to work at full duty. He stated, however, that he self-modified his job. He watched how he did things and how he lifted so as not to hurt himself again. He said his coworkers helped by doing the heavy lifting. He was prescribed a TENS unit and wore it to work. He also took hydrocodone and a muscle relaxant. Claimant continued to work until August 20, 2010, when he and other employees were laid off. He has not worked since August 2010 and has been receiving unemployment benefits. He has applied for jobs but has not been offered any positions. At some point he attended truck driving school and obtained a CDL, but he has not been hired by any trucking company.

Claimant said that before this injury, he had not had any problem with his back, other than some incidents when he used to work at IBP. At those times, he was treated by a chiropractor for a week or so. He had not seen a healthcare provider for his back since 1993 until his current accident. Before his accident in April 2008, he was able to do any physical activities at work or away from work. He used to hunt and would run four or

five miles every day, but he is unable to do so now. He is, however, capable of doing his own cooking, cleaning, and normal daily errands.

Dr. P. Brent Koprivica is board certified in emergency medicine and occupational medicine. He examined claimant on January 29, 2011, at the request of claimant's attorney. Dr. Koprivica said he understood claimant injured his low back and associated with his injury had left radicular symptoms. MRI scans showed multi-level degenerative changes in the spine along with a disc bulge at L4-5. Claimant was treated non-operatively. Claimant was treated with epidural steroid injections, which Dr. Koprivica said was an appropriate means of treatment for claimant's condition. Claimant had a positive response to the injections temporarily.

When Dr. Koprivica saw claimant in January 2011, claimant's complaints were that he continued to have ongoing back pain. Claimant's left radicular symptoms were intermittent but persistent. Claimant also had pain that would radiate into the left groin area. In Dr. Koprivica's physical examination, he found claimant had deficits in range of motion. He had loss of flexion and extension, but his lateral flexion was preserved.

After reviewing the medical records, taking a history, and performing a physical examination, Dr. Koprivica opined that claimant suffered a work-related injury on April 7, 2008, while lifting a piano. Dr. Koprivica concluded that claimant suffered permanent aggravating injury to previously asymptomatic multilevel degenerative disc disease. Based on claimant's development of persistent pain and radicular symptoms, Dr. Koprivica opined that claimant had an annular injury at the time of the accident and over time he developed small disc protrusions at L4-5 and L5-S1, although he admitted that the annular tear was not specifically noted on the MRI taken in April 2008. Dr. Koprivica did not believe claimant had a true radiculopathy, but he had symptoms down his leg and responded to epidural steroid, which is the non-operative treatment for radiculopathy. Regarding claimant's groin pain, Dr. Koprivica said the pain was not from a spinal nerve or spinal related condition but was a peripheral sensory entrapment problem in the groin. In terms of claimant's impairment, he did not put any significance on the groin pain and was not sure he could establish causation of that problem. Dr. Koprivica said claimant was at maximum medical improvement in January 2011, but he believed claimant would need ongoing treatment.

Using the AMA *Guides*,[2] Dr. Koprivica rated claimant as having a 10 percent permanent partial impairment to the whole body. He stated he used the Range of Motion (ROM) Model as a differentiator. He stated that using the ROM Model in this case calculated to a 15 percent impairment. He said the *Guides* outline that one is supposed to use the DRE Model category closest to that as the assignment of impairment. Since 15 percent is halfway between DRE III and DRE IV, Dr. Koprivica chose to go to the lower

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

DRE category for the assignment. If he had strictly used the DRE Model, claimant would have been in Category III. Dr. Koprivica said the 10 percent impairment was attributable to the April 7, 2008, injury in isolation because although claimant had degenerative disc disease in his lumbar spine, he had no history to suggest it was an impairing condition.

Dr. Koprivica issued a supplemental report dated March 28, 2011, in which he placed restrictions on claimant. This report was based on his previous examination in January. Dr. Koprivica placed claimant in the medium category as relates to lifting, finding claimant could occasional lift a maximum of 50 pounds. He also stated that claimant should avoid constant bending at the waist, pushing, pulling and twisting, and should avoid sustained or awkward postures of the lumbar spine. Claimant should also avoid frequent or constant squatting, crawling, kneeling or climbing; he should avoid equipment operation activities or commercial driving where whole body vibration exposure or jarring occurs. Dr. Koprivica reviewed a task list prepared by Doug Lindahl.[3] Of the 16 tasks on that list, he opined that claimant was unable to perform 5 for a 31 percent task loss. He did not believe claimant was permanently, totally disabled.

Dr. Chris Fevurly is board certified in internal medicine and preventive medicine with a specialization in occupational medicine. He is also a board certified independent medical examiner. He examined claimant on April 22, 2011, at the request of respondent. Claimant's complaints were constant low back pain which varied in intensity depending upon his activity. He said the pain radiated into the flanks and buttocks but did not radiate into the lower extremities. Claimant also complained of some numbness along the left lateral and anterior thigh.

In his physical examination, Dr. Fevurly found claimant had no visible muscle spasms. Dr. Fevurly found some tenderness over claimant's low back. But he stated that for a 55-year-old, claimant had better than average range of motion in the low back. Dr. Fevurly said claimant's physical examination was relatively unremarkable other than the diminished sensation along the left lateral thigh, which he said was the probable result of a femoral anterior cutaneous nerve injury or entrapment but was not consistent with radiculopathy. He said claimant had no evidence of motor deficit or neurological issues. Dr. Fevurly noted that claimant had advanced degenerative changes in his low back that were preexisting. Dr. Fevurly said he did not find any objective findings of radiculopathy. Dr. Fevurly opined that the changes shown in claimant's radiographic testing were the result of living and aging and were not the result of an acute injury. After Dr. Fevurly's examination, he diagnosed claimant with chronic low back pain regional and non neurogenic; preexisting advanced degenerative disc disease and associated bony spondylosis in the lumbar spine; and numbness along the left lateral thigh consistent with

[3] Doug Lindahl, a vocational rehabilitation consultant, spoke with claimant by telephone on March 28, 2011, at the request of claimant's attorney. He prepared a list of 16 nonduplicative tasks claimant had performed in the 15-year period before the accident of April 7, 2008. Claimant affirmed that Mr. Lindahl's list accurately described the tasks he performed during those 15 years.

meralgia paresthetica (unrelated to the back injury). He admitted that the medical records he reviewed did not indicate claimant had any prior low back problems before the accident, nor did claimant or anyone else indicate claimant had any prior low back problems before the accident in April 2008. Neither did claimant have any restrictions or limitations, had not had any diagnostic testing, and had no impairment rating of his back before April 2008.

Dr. Fevurly found claimant to be at maximum medical improvement and stated he did not think there would be any reason for other interventions to his back. He noted that claimant had gradual improvement in his symptoms and was able to advance his activity level to the point where he could return to his full regular work duties without restriction by June or July 2008 and continue working for another two years. Dr. Fevurly believed that the fact claimant was able to go on with his regular activities on the job implied there was no change in his impairment from the work event in April 2008. However, he also said he suspected claimant changed the way he did his job so that he could perform his job duties while still working for respondent.

Dr. Fevurly rated claimant as being in DRE Category I of the AMA *Guides* for a 0 percent impairment. Dr. Fevurly did not think claimant had a change in his physical structure or in his ability to perform activities of daily living, and the mere complaint of pain does not necessarily equate to an impairment rating under the *Guides*.

Dr. Fevurly did not believe that claimant required permanent restrictions. Dr. Fevurly reviewed the task list prepared by Doug Lindahl and although he found that claimant performed very heavy work, he believed claimant could perform all the tasks on the list. Accordingly, he opined that claimant had a 0 percent task loss. He did not think claimant was totally, permanently disabled.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

> ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,[4] the Kansas Supreme Court stated: "K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability." In *Tyler*,[5] the Kansas Court of Appeals stated: "Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[7] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[8]

ANALYSIS

In her Award, the ALJ set forth detailed findings of fact and conclusions of law that are accurate and well supported in the record. No physician disputed claimant's testimony that he suffered an injury to his back on April 7, 2008, lifting a piano at work. Respondent

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[4] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 610, 214 P.3d 676 (2009).

[5] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

[6] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971); see *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[8] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

disputes the permanency of claimant's injury rather than questioning that there was an accident and injury. With regard to the issue of whether claimant suffered a permanent injury due to the work-related accident, Judge Sanders said:

> It is Respondent's position citing Dr. Fevurly's testimony that Claimant has no permanent impairment as a result of his work accident. Respondent points to the fact that Claimant returned to work and worked for twenty-six months after his work injury without work restrictions. However, the uncontroverted evidence is that while Claimant did return to work without formal restrictions, Claimant self-limited or accommodated his work duties. A primary example is that Claimant always got assistance to lift heavier objects whereas before the accident Claimant did a lot of heavy lifting himself. Claimant, in attempting to follow Dr. Wright's advice, was very careful about the way he did things such as no rapid bending or twisting. Dr. Koprivica observed that while he did not initially assign permanent work restrictions to Claimant he did not think that Claimant could sustain unrestricted work and eventually assigned permanent work restrictions. Claimant is limiting some of his personal activities due to his back injury. Claimant has low back pain with movement and has pain symptoms that go into his left leg. It is found and concluded that Claimant did suffer permanent functional impairment as a result of his work accident.[9]

Respondent argues that it is not "uncontroverted" that claimant self-limited his job duties after returning to work. Claimant's testimony and his statements to Dr. Fevurly were equivocal on this point. Even so, despite returning to his former job, claimant has never been pain free since his accident. He has had five years of medical treatment, including physical therapy, four rounds of epidural steroid injections, the most recent being on February 6, 2009, and has had a TENS unit installed for his back to help control his pain. In addition, at the time of claimant's testimony at the regular hearing, he was still on prescription pain medication and a muscle relaxer and Dr. Wright was recommending additional physical therapy and another epidural injection. When all this is considered together with the testimony of claimant and the expert medical opinions of Dr. Wright and Dr. Koprivica, this is persuasive evidence of a permanent injury and impairment.

CONCLUSION

(1) Claimant has a 5 percent functional disability to the whole body. As of August 20, 2010, claimant has a 57.75 percent work disability.

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[9] ALJ Award (Sept. 28, 2011) at 7. The ALJ's Award at pg. 6 mistakenly states that Dr. Koprivica believed claimant "could sustain unrestricted work." This appears to be a typographical error as Dr. Koprivica, in his deposition, specifically testified that he did not believe claimant would be able to sustain full unrestricted work. Koprivica Depo. at 37.

(2) Claimant is entitled to ongoing medical care for medication management and other chronic pain treatment. Additional future medical treatment will be considered upon proper application.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated September 28, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge